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ABSTRACT

This paper describes how the Minimum Continuing Legal Education Board (MCLE) of the Supreme Court of New Mexico used the "MacCrate Report" to start a process of identifying the need for practical training in ethics education for legal professionals. The report, "Legal Education and Professional Development--An Educational Continuum" (1992), better known as the MacCrate Report, has as a primary emphasis a section on fundamental lawyering skills and values of the profession as well as the continuum nature of professional legal education. Based on the report, a training needs assessment instrument concerning fundamental lawyering skills was developed. Contrary to some expectations, the instrument did not include a section pertaining to self-assessment of "competence in values." This controversy started a review to determine the extent to which ethics is taught in legal education, both in the law school and continuing legal education programs. Ethics was found to be extremely neglected in both settings. (Contains 18 references.) (DB)

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Identifying the Need for Teaching Ethics in Professional Legal Education

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Abstract

The Minimum Continuing Legal Education Board of the Supreme Court of New Mexico used the "MacCrate Report" to start a controversial process of identifying the need for practical training in ethics education for legal professionals. From this Report, a training needs assessment instrument concerning fundamental lawyering skills was developed. Contrary to some expectations, the instrument did not include a section pertaining to self assessment of "competence in values." This controversy started a review to determine the extent to which ethics is taught in legal education, both in the law school and continuing legal education programs, and was found to be extremely neglected. Legal educators must articulate a value system, yet acknowledge the realities of lawyering. The practical training needed in ethics education may well be a redesign of the curriculum to include course content that goes beyond simply the code of professional responsibility and integrates in a pervasive manner throughout all the subject matter.

Identifying the Need for Teaching Ethics in Professional Legal Education

The purpose of this paper is to describe how the Minimum Continuing Legal Education Board (MCLE) of the Supreme Court of New Mexico used the "MacCrate Report" to start a process of identifying the need for practical training in ethics education for legal professionals.

Background

The report, Legal Education and Professional Development - An Educational Continuum (1992) better known in the law profession as "The MacCrate Report," in honor of the distinguished chairperson of the Task Force, Robert MacCrate, has as a primary emphasis a section on fundamental lawyering skills and values of the profession. This report was timely because the State Bar of New Mexico had been struggling for several years to operationally define "competence" by identifying the fundamental skills one must possess to be considered competent in the practice. The report not only provided a list of the fundamental skills one must possess for competence, but it also placed in context the continuum nature of professional legal education. With these two educational aspects clearly established, the post law school curriculum development took a new and distinct direction. In addition, the relationship with the University of New Mexico School of Law, which has always been positive, is also taking a new direction (McDonald, 1993).

With the necessary fundamental skills identified by the Report, a method of establishing benchmarks of learning was undertaken. The assistance of a New Mexico

Supreme Court educational regulatory program of MCLE was gained, and in consultation with experts in survey research, an instrument was designed to collect pertinent information to create a data base of need (Askins, McDonald, & Johnson, 1994). From the needs data base, educational impact information provided guidance to the planning and delivery of relevant continuing legal education. The design of the instrument was based on the "discrepancy needs" research model; discrepancy being defined as the difference between some standard of value and an actual status; need defined as a quantifiable gap in attitude, achievement, performance, or skills and concepts between the real and ideal or between the actual, and desired (Johnson, Snyder, & Johnson, 1992). Within the survey construct, information is obtained regarding self-perceptions, of efficiency level in the various fundamental lawyering skills and the desire, or lack of same, for continuing legal education in specific areas. In addition to using the statements contained within the fundamental lawyering skills section, an additional section on generic cognitive skills was included (Askins, McDonald, & Johnson, 1994). This section was added to test the response of the legal profession against data being collected in other professions. Whether this section would remain was to be determined after comparison data were analyzed.

The survey instrument has since been tested to determine content and construct validity. In November, 1993, the first sets of data were collected, analyzed, and a report was submitted to the MCLE (Askins, McDonald, & Johnson, 1994).

Much to the surprise and somewhat dismay of the distinguished chairperson of the MacCrate Report, our instrument did not include statements related to the

fundamental values of the profession as set out in the Report. It was not, however, an oversight on our part. There were two concerns: one with the statement of values and whether we agreed that the discussion of values was comprehensive; and, two, the problem with the use of a self-perception instrument to produce a data base on values. After months of anguish over the concerns and in consultation with experts and colleagues, the values section was temporarily set aside.

During a conference in the Spring of 1993, MacCrate expressed an interest in deleting the generic cognitive skills section of the instrument and substituting a section on professional values. After an attempt of his own, he outlined the following in a letter:

> My objective was to promote consideration of the entire SSV and to dispel the notion that competence for a lawyer is simply a matter of attaining proficiency in specified skills. In this I fear that I focused on the merits of the SSV as an instructional tool for lawyers and not on what the survey would yield of interest to planners of CLE.
>
> On my return I drafted a possible section on values in a format consistent with that of your survey, but my colleagues have convinced me that there is a fundamental conceptual difficulty in asking for a self-evaluation of one's values. In our culture, there is no such thing as "competence" in values and probably no one outside of the membership of a devoted cult would ever express a desire for "training" in values. In short, self-evaluations of lawyers' values would produce nothing of utility to either the bench or the bar.
>
> Approaching your survey from the perspective of what do you really need to know to plan an effective CLE program, I am inclined now to think that your 41 questions based on the SSV would probably be the most useful without the additional seven generic cognitive skills (items 42 to 48).
>
> I apologize for my detour down the "values" alley. I am delighted with what you are doing and continue to want to help you in any way that I can.

Needless to say, the researchers were relieved to receive this letter and that these findings were consistent with our conclusions.

As previously stated, our concentration has been on the fundamental lawyer skills area of the MacCrate Report. To comprehensively study and address the subject, a cooperative relationship with the law school was necessary. It should be noted that the State Bar of New Mexico and the University of New Mexico School of Law are mutually supporting, and such a relationship is desirable for all law schools and bar associations. This comfortable relationship has been developed by recognizing, appreciating and supporting the law school's curriculum and the graduate they produce; and, we take responsibility, in partnership with the law school, for designing and delivering the post law school continuum of education which will guide their legal career. This involves participating by providing a transitional period of education developed around the fundamental lawyering skills, and outlining a logical and comprehensive continuum of educational offerings in all substantive areas of practice.

However, the State Bar of New Mexico remained concerned with the difficulty experienced in dealing with the values area of professional development. In 1994, in an effort to redirect thinking, a review of the law school's general ethics curriculum, the related literature, and the disciplinary rulings, was undertaken. Also, an array of observation data were analyzed. A brief description of those findings are presented in the following sections.

Teaching of Ethics in Law School Curriculum

In reviewing law school curriculum, it was found that the core requirements are basically determined at the individual school level, with one exception: the requirement of a course in ethics. The basic for including ethics in the law school curriculum is written

within the American Bar Association Standards for Approval of Law Schools, Section 302 (a) (iv). This Section establishes and outlines the only curriculum requirement of law schools for ABA accreditation. Stated within the Section is the requirement: "The law school shall ... require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession." A review of the standards renders a statement of minimum requirement, but no direction is given as to content or when the course(s) should be taught; who should teach the course(s); or the qualifications necessary to teach the course(s). And in a survey of law schools, for the most part we found ethics curriculum to be incorporating the model Rules of Professional Conduct, the Model Code of Professional Responsibility, State Ethics Codes, ABA Ethics Opinions, State Ethics Opinions and Case Law. With few exceptions, little time was being spent on instruction in learning how to make ethical decisions; and, with few exceptions there was no attempt to integrate the teaching of ethics within the core courses (Bushnell, 1993). There was a great deal of variation in the courses(s), and there were few specific qualifications stated for those who would be teaching the course(s).

Related Literature

From the literature review of the general area of lawyer ethics, it can be noted of an advancing public dissatisfaction within the profession itself. Likewise, there was found an advancing dissatisfaction with the profession (Christensen, 1984; Abrahamson, 1984). The basis of dissatisfaction might best be stated as what seems to be a shortfall in meeting both public and professional expectations. For the public, the view was that delivery of legal services should be conducted in a more professional manner. A majority of the

concerns were of a nature that, by themselves, did not rise to the level of a disciplinary action; but were rather behavioral traits that were: unpleasant, impolite, and not conducive to building a relationship or solving a legal problem. For the profession, there was considerable discontent with the career choice of the practice of law: the preparation for practice is costly; the work is demanding; the collegial support lacking; and, the rewards few. According to Abrahamson (1984), too many law students view law school as fostering skepticism, as destroying values. The question soon became whether something is going astray with a system that produces such dissatisfaction; and, if so, is there some point in time than can be identified as the point where change begins, to make significant contribution to the dissatisfaction in and with the profession (Benjamin, Kasniak, Sales, & Shanfield, 19867).

In an attempt to formulate some ideas as to causes of discontent, the research team began to look back in time. The search produced a 1986 study conducted at the School of Law, University of Arizona (Benjamin, Kasiniak, Sales, & Shanfield, 1986). The study used a battery of five tests to establish the indices. The most important instrument used, the Brief Symptom Inventory (BSI), is composed of a list of 53 symptoms to which the subject responds. Data are then formed into nine symptom dimensions of distress:

- somatization - reflects vague physical symptoms not explained by an existing physical disorder or related to side effects of medication, drugs, or alcohol.
- obsession-compulsive - involves thoughts and actions that recur in an unavoidable or ritualistic manner.
- interpersonal sensitivity -reflects interpersonal feelings of inadequacy and inferiority that arise as the subject maladaptively responds to interpersonal relationships.

- depression - focuses on depressive symptoms that are suggestive of a prolonged, sad state triggered by an overreaction to stressful events.

- anxiety - comprises a set of symptoms involving psychomotor tension, autonomic hyperactivity, apprehensive expectation, and hyperattentiveness.

- hostility - characterizes opposition in feeling, thought, or action to adversive stimuli, with frustration and unexpressed aggression forming the underlying dynamic.

- phobic anxiety - focuses, unlike anxiety, on symptoms relating to an intense but unrealistic threat from some specific object or situation.

- paranoid ideation - comprises a "mode of thinking" typified by "projection, hostility, suspiciousness, centrality, and fear of loss of autonomy".

- psychoticism - focuses on the extent of social alienation and isolation with extreme ratings possibly signifying loss of contact with reality, hallucinations, or delusions.

The subjects of this study were law school students. The study of subjects was conducted before, during and after law school. The findings reported that prior to entry into law school, law school students expressed psychopathological symptom responses similar to the normal population. But, during law school, there was significant elevation of the symptoms as described above. And, revisited again two years following graduation from law school, the symptom levels subsided only slightly. Thus, the study suggests that in relation to emotional well-being, a student enters law school with psychopathological symptoms normed with the general population. However, during law school the symptoms are elevated; and, the symptoms do not adjust back to the level demonstrated prior to entry into law school and that of the normal population (Benjamin, Kasiniak, Sales, & Shanfield, 1986).

According to Benjamin (personal communication, April 26, 1994), the study has been replicated recently in another geographic location, and the findings were the same. And, to eliminate the argument similar findings would be produced in any other high stress profession, the study was conducted with medical school students, using the same procedure. Far fewer medical students suffered from elevated symptoms during medical school; and, unlike the law students, the symptoms subsided two years into practice and returned to near the level of the normal population (Benjamin, Kaszniak, Sales, & Shanfield, 1986).

The literature further supports the finding of the Arizona study in that it suggests that the psychological health of lawyers forms the basis for much of the public's criticism. The literature, as does the Arizona study, also indicates that these problems originate during law school (Bauer, 1975; Christensen, 1984). An example of a behavioral assumption commonly made by the public about the professional development of lawyers includes the notion that attitudes, behaviors, values, and traits are personally or socially undesirable and may be inimical to the practice of law (Taylor, 1975). Thus, the development and maintenance of the psychological well-being of law students may be stunted by the process of legal education or, at best, the development and maintenance of psychological well-being is ignored by the process altogether.

Another interesting and, recent survey is one of lawyers, judges and law students conducted by the Josephson Institute (Hanson, 1993). In this study, it was found that too many lawyers seem to have a difficult time distinguishing right from wrong. An argument could be made that similar findings could be produced in other professions. However,

the author comments, whether within the legal profession or another profession, it does not matter. What does matter is that lawyers bear a greater burden of trust in society than other professions; they are, in fact, autonomous moral agents and they are called to be good people - there is no choice in the matter (Beauchamp & Bowie, 1988).

Disciplinary Rulings

In analyzing the disciplinary rulings in New Mexico, there is an indication of a disproportionate number of lawyers being sanctioned who are just past the ten years in practice time-frame. The thinking is that the infractions are probably occurring sooner; but due to the time involved to process through the system, and other factors, may account for the appearance that the younger lawyers are not at risk. Case studies suggest otherwise.

There is also a disproportionate number of lawyers in New Mexico being sanctioned who are solo or in a small firm practice. The reasons for sanctions are predominately client neglect. To understand more about the neglect aspect, a study of the materials produced during investigation would be necessary. Those materials, due to confidentiality, cannot be made available in their current form. However, the thinking is that solo or small firm practice does not provide the protection as compared to a large legal firm where systems are in place to provide a buffer from infractions due to lack of experience or supervision.

Defining Ethics

The New Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition, defines ethics to be the principles of morality, of the field of study of morals or

right conduct. Values, ethics, and professionalism are often used interchangeably in the profession. We suggest that there is a hierarchial difference in the three and that values define ethics; and that ethics - the principles of morality - is the fundamental foundation from which professionalism must develop.

Ethics: A Field of Study

A consensus is developing among the professions that there is a need to consider ethics as a field of study. And, the level of importance is such that the necessary resources be devoted to a complete study, with recommendations.

Arguments are proposed that ethics cannot be taught. You are either ethical or you are not. However, research indicates that ethics (the principles of morality) can be taught; it is not characteristic that one is given at birth. Further, research supports the fact that the principles of morality are personally developed. We arrive at our values system through free choice using six approaches: authority, deductive logic, sense experience, emotion, intuition and science. It is from these we "believe" or "know" something; and, there is no separation between how we arrive at values from the values themselves. Through freedom of choice we adopt and emphasize one over the other until we turn the modes into dominant personal values. Based on emphasis, we are led to certain specific beliefs and actions (Rest, 1986). Assisting students at all levels to be able to sort through in a systematic manner is important as it will lead to a more purposeful and satisfying life. (Rest, 1986)

The design of legal education is developed around creating a disequilibrium in students' thinking which allows them to more fully question, explore and advance

learning. The same technique is used in most graduate level programs. However, the application process of influence and training can also become muddled when confronted with the unexpectedness, the diversity, and the quarrelsomeness of American values, where there is an apparent lack of any real agreement or uniformity in our personal beliefs that guide our daily conduct and make us what we are. Through that muddle, however, there are options, and informed choices can be made so that one can decide what one will be (Weller, 1994). Due to the role of the lawyer in society, it becomes important to look to a design of a system of teaching that supports the moral development of the law student.

Although the State Bar of New Mexico was not comfortable in incorporating the measurement of values within our survey research instrument, there is an extensive body of research to indicate that ethics - the principles of moral judgment - can be measured; thus, can be taught, adjusted or modified. One instrument of measurement is Rest's Defining Issues Test (DIT). The DIT is designed theoretically to measure how concepts of justice influence the process of moral judgment (Rest, 1986). The DIT has been used to measure and report the levels of moral judgment and the ethical reasoning processes of numerous groups of subjects. Whether this particular instrument is due our consideration is expected to be determined at a later date.

As MacCrate suggested in his letter in the Spring of 1993, competence of a lawyer is not simply a matter of attaining proficiency in specified skills. And a review of the observation data and cases indicate an ever increasing problem not with knowledge of the law, but behavior that leads to ethical problems. If, as seems to be the case, little

emphasis is being placed on the development of curriculum that teaches ethics, which should contribute to the maintenance of psychological well-being in law school, this suggests the necessity of a review. The development of a strong and healthy value system as it directly relates to the practice of law may be too important to be left to chance.

Ethical issues and ethical decisions permeate all aspects of life. They are topics of increased importance across all professions because of the effect on other people. An ethical decision is the moral judgment of what is right or wrong when an ethical issue is recognized. Rest (1986), using Scott Peck's idea, summarizes this as:

> A century ago, the greatest dangers we faced arose from agents outside ourselves: microbes, flood and famine, wolves in the forest at night. Today the greatest dangers - war, pollution, starvation - have their source in our own motives and sentiments: greed and hostility, carelessness and arrogance, narcissism and nationalism. The study of values might once have been a matter of primarily individual concern and deliberation as to how best to lead the good life. Today it is a matter of collective human survival. If we identify the study of values as a branch of philosophy, then the time has arrived for all women and men to become philosophers - or else.

Conclusion

The issuance of the MacCrate Report has caused us to think through the entire process of teaching practical skills. It also has caused us to struggle with the concept of "competence in values." Legal educators must articulate a value system, yet continue to acknowledge the realities of lawyering. As suggested by Rhode (1992), the practical training needed in ethics education may well be a redesign of the curriculum to include course content that goes beyond simply the code of professional responsibility and integrates in a pervasive manner throughout all the subject matter.

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